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No. 90-219

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RIVERVIEW INVESTMENTS, INC. AND MELVIN F. SMITH,

Petitioners,

v.

OTTAWA COMMUNITY IMPROVEMENT CORPORATION, CHARLES BRUSKOTTER, ESTATE OF JAMES BECKMAN, RICHARD EDELBROCK, THOMAS DOEPKER, DAVID LAUDICK, RICHARD LAUDICK, LOUIS MACKE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

At trial, Petitioners, having no direct evidence of the alleged conspiracy, asked the jury to infer that Respondents conspired to restrain trade. Explicitly applying this Court's decisions in *Monsanto* and *Matsushita* which establish the standard of proof for inferring an antitrust conspiracy, both the District Court and the United States Court of Appeals for the Sixth Circuit determined that Petitioners failed to present sufficient evidence to support the requested inference and that judgment n.o.v. for Respondents was proper.

The question Petitioners present is:

Whether the Sixth Circuit and District Court erred in evaluating Petitioners' evidence and in determining that Petitioners failed to present sufficient evidence for the jury to infer the alleged conspiracy?

LIST OF PARTIES AND RULE 29.1 LISTING

Petitioners in the caption to their Petition incorrectly identify the Village of Ottawa and James Beckman as parties. The Village of Ottawa was dismissed from this case before trial and was not a party to the Sixth Circuit appeal. The estate of James Beckman replaced James Beckman as a party prior to trial.

Respondent Ottawa Community Improvement Corporation is an Ohio nonprofit corporation with no parent companies and no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Question Presented for Review	I
List of Parties and Rule 29.1 Listing	II
Table of Contents	III
Table of Authorities	IV
Opinions Below	2
Statement of the Case	3
Introduction	3
Statement of Facts	4
The Proceedings Below	8
Reasons for Denying the Writ	11
I. The Sixth Circuit Faithfully Applied This Court's *Monsanto* and *Matsushita* Decisions	12
II. Petitioners' Contention That The Sixth Circuit and District Court Improperly Assessed Petitioners' Evidence Does Not Merit Review	15
III. Additional Grounds Support Denying the Writ	18
Conclusion	21

TABLE OF AUTHORITIES

CASES

Page

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 18

Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) 18

Fisher v. City of Berkeley, 475 U.S. 260 (1986) 18

Graver Tank & Manufacturing Co. v. Linde Co., 336 U.S. 271 (1949) 15

Hatley v. American Quarter Horse Association, 552 F.2d 646 (5th Cir. 1977) 18

Martens v. Barrett, 245 F.2d 844 (5th Cir. 1957) 19

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 4, 5, 9, 11, 12, 13, 14, 16

Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705 (11th Cir. 1984) 19

Monsanto Company v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 4, 5, 9, 11, 12, 13, 14, 17

NCAA v. Board of Regents, 468 U.S. 85 (1984) 15

Nelson Radio & Supply Co. v. Motorola, Inc., 200 F. 2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) 18

Nurse Midwifery Associates v. Hibbett, 689 F. Supp. 799 (M.D. Tenn. 1988) 18

Palazzo v. Gulf Oil Corp., 764 F.2d 1381 (11th Cir. 1985), *cert. denied* 474 U.S. 1058 (1986) ... 20

Potters Medical Center v. City Hospital Association, 800 F.2d 568 (6th Cir. 1986) 18

Riverview Investments, Inc. v. Ottawa Community Improvement Corp., 769 F.2d 324 (6th Cir.), *as amended*, 774 F.2d 162 (6th Cir. 1985) 9

Page

Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079 (6th Cir. 1983) 18, 19

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 9

Wellwoods Development Co. v. City of Aurora, 631 F. Supp. 221 (N.D. Ill. 1986), *aff'd without opinion*, 822 F.2d 1091 (7th Cir. 1987) 19

STATUTES

Sherman Act, Section One, 15 U.S.C. § 1 ..... 3, 8, 12

Ohio Revised Code §§ 165.03(c), 1724.10 5

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Ottawa Community Improvement Corporation, Charles Bruskotter, Estate of James Beckman, Richard Edelbrock, Thomas Doepker, David Laudick, Richard Laudick, and Louis Macke respectfully request this Court to deny the Petition for Writ of Certiorari seeking to review the

Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit filed on March 27, 1990.

OPINIONS BELOW

Petitioners omitted from the appendix to their Petition the Sixth Circuit's order of May 1, 1990 which corrected the final sentence of the March 27, 1990 Opinion. That order is reproduced in Appendix A. The corrected opinion of the Sixth Circuit is reported at 899 F.2d 474.

STATEMENT OF THE CASE

Introduction

This case involves a determination by the Ottawa Community Improvement Corporation ("CIC") made at meetings held during April and August 1980 not to approve an application of Zappala & Company, Inc. ("Zappala"), an investment banking company, for the Village of Ottawa to issue industrial revenue bonds ("IRBs") to finance construction of a K-Mart store.[1] Zappala's application contemplated that Chase Shopping Centers, Inc. ("Chase") would receive the proceeds of the bond issuance and use those proceeds to finance the construction of the K-Mart store. Chase would own the store and lease it to K-Mart Corporation ("K-Mart"). Chase proposed to acquire the land for this project from Petitioner Riverview Investments, Inc.. ("Riverview").

In December 1981, Riverview and Melvin F. Smith, Riverview's sole shareholder, ("Petitioners") sued the CIC and its seven members who voted to deny Zappala's application. Petitioners claimed that the members of the CIC who voted against Zappala's application had conspired to restrain trade in violation of Section One of the Sherman Act, 15 U.S.C. § 1.[2] Petitioners had no direct evidence of the claimed conspiracy but asked the jury to infer the existence of the alleged conspiracy. After a jury verdict for Petitioners, the District Court entered judgment notwithstanding the verdict for

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[1] An IRB is a debt instrument issued by a state or political subdivision, but repaid by a private business. The proceeds of the debt issuance are paid to the private business to finance industrial or commercial development. Because IBRs are not subject to federal income tax, IRBs carry a lower interest rate than comparable debt instruments.

[2] Petitioners' conspiracy claim is legally insufficient. As a matter of law, the CIC and members of its governing board constitute a single entity and are incapable of constituting a conspiracy under Section One of the Sherman Act. This legal defect in Petitioners' claim constitutes one of several additional grounds for affirming the judgment of the Sixth Circuit. See page 18, *infra*.

Respondents. Applying this Court's teachings in *Monsanto* and *Matsushita*, the District Court determined that Petitioners failed to present evidence permitting reasonable minds to infer that Respondents had engaged in the alleged conspiracy.[3] The Sixth Circuit Court of Appeals affirmed the judgment of the District Court.

Statement of Facts

1. The Proposed Development

Because Petitioners challenge the lower courts' assessment of the evidence, Respondents need to state the facts shown at trial in moderate detail.

The Village of Ottawa ("Village") is a small community in Northwestern Ohio. Its 1980 population was 3,870.

In 1979, Village Council determined that it should have the authority to issue IRBs to induce new industry to Ottawa. At that time, IRB financing normally carried a lower interest rate than conventional financing. By offering IRB financing to a private business, the Village might attract that business to locate in the Village.

Accordingly, on February 26, 1979, Village Council adopted Ordinance 1014. That ordinance appointed the CIC as the Village's agency for industrial, commercial and other development. The Village and CIC then entered the Agreement and Plan attached to the ordinance ("Plan"). This Plan authorized the CIC (i) to review applications of private businesses for the Village to issue IRBs to finance a development project, (ii) to determine whether such applications ac-

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[3] *Monsanto Company* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). The District Court also conditionally granted a new trial on the ground that the verdict was against the weight of the evidence.

cord with the Plan for the development of the Village, and (iii) to certify its determination to Village Council.[4]

The Plan set forth eight criteria for the CIC to consider in reviewing applications for IRB financing. These criteria included whether the proposed development (i) creates and preserves jobs and employment opportunities in the Village, (ii) maintains and increases the tax valuation of property within the Village, and (iii) is consistent with social, economic and geographic factors present in the Village.

Petitioner Riverview is an Ohio corporation that was engaged in investing in real estate in the Village. Petitioner Smith is the President and sole shareholder of Riverview.

In 1979, Riverview purchased two contiguous parcels aggregating 12.9 acres on Route 65 at the northern edge of the Village. Riverview then granted Chase an option to purchase 10.23 acres. Chase proposed constructing a retail store on the property for lease to K-Mart.[5] On March 28, 1980, Chase exercised its option to purchase Riverview's 10.23 acres subject to the conditions that (i) the CIC and Village approve IRB financing for the K-Mart project, and (ii) suitable arrangements be made for sale of the bonds.[6]

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[4] To obtain the authority to issue IRBs, Ohio law required the Village to appoint a CIC as its agency and to enter an Agreement and Plan with the CIC. Ohio Revised Code §§ 165.03(c); 1724.10. The CIC is a special statutory, nonprofit corporation created to serve as the Village's agency. *Id.*

[5] To shroud obvious defects in Petitioners' standing (see pp. 18-19, *infra*), Petitioners misstate their role in the proposed development. The Petition repeatedly refers to "petitioners' development project." In fact, Riverview's role was not as the developer but rather as a seller of land for the project. Smith had no role in the project other than through Riverview. Petitioners also misstate the record by suggesting that the project included a K-Mart, a food store, and other commercial facilities — and that the CIC voted upon this "development project." In fact, the application to the CIC covered only a K-Mart store.

[6] Petitioners mistakenly assert that approval of IRB financing was the "only" remaining condition for the project to proceed. (Petition at 3). The

2. The April 1980 CIC Meetings

On April 3, 1980, a Zappala representative presented to the CIC the application for Chase to finance development of a K-Mart store by having the Village issue $1.9 million in IRBs.[7] At the meeting, all eleven CIC board members, including Petitioner Smith, voted to table the application until April 16, 1990.[8]

The CIC reconvened on April 16. Zappala's application played to a full house. Approximately 35 or 40 Village residents attended. Residents stood in the hallway because Village Council chambers were so crowded.

The CIC meeting lasted nearly three hours. Many residents spoke against Zappala's application. Their concerns included that (i) K-Mart would obtain an unfair advantage over existing retailers who could not borrow at the preferential IRB rate, (ii) businesses would close as a result of K-Mart's entry with preferential financing, (iii) existing jobs would be lost (iv) property values would deteriorate and (v) the property tax base would be impaired.

Following the public discussion, the CIC secretary read the eight criteria specified in the Plan which the CIC members were to consider. The CIC members voted six to three not to approve the application.

At trial, each Respondent explained his reasons for deciding that Zappala's application did not meet the criteria of the Plan. A summary of the reasons is as follows.

Respondents shared the residents' views that the development would not create and preserve jobs — the Plan's first

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project also was conditioned upon a lease with K-Mart, which lease had not been entered.

[7] Neither Chase nor Zappala has been a party at any stage of this litigation. Neither Chase nor Zappala is affiliated with Petitioners.

[8] Petitioner Smith's vote for the motion to table belies Petitioners' suggestion at page 4 of the Petition of something sinister in the decision to table Zappala's proposal for two weeks.

criterion. Zappala was not proposing an industrial development which nearly always adds jobs. Rather, K-Mart would vie with existing retailers for the same dollars in the small Ottawa market. K-Mart thus might displace existing retailers with a net loss of jobs. Moreover, minimal staffing is a characteristic of K-Mart stores, and K-Mart would not create as many jobs as it eliminated. Some Respondents were also skeptical because prior IRB applicants had not met their employment projections.

Another criterion of the Plan is whether the development "maintains and increases the tax valuation of property within the municipality . . . ." Residents at the CIC meeting protested that many businesses would close if K-Mart received preferential financing. From this evidence, many Respondents concluded that the development would cause deterioration of property values and of the tax base.

Finally, certain Respondents believed the development was not consistent with the criterion concerning the economic welfare and planning of the Village. Village Council had recently spent $250,000 in tax monies to improve the downtown shopping district, reflecting the Village's desire to enhance downtown. There was also concern that K-Mart's failure to attend the CIC meetings reflected a lack of commitment to the community.

3. The August 7, 1980 CIC Meeting

Following the April 16 meeting, Petitioner Smith engaged in an extensive lobbying campaign to reverse the CIC vote. Smith met with each CIC member who had opposed Zappala's application. Smith sent a mailing encouraging Village residents to express to CIC members their support for the K-Mart project. Smith sent a questionnaire to Village residents concerning whether such residents supported the Zappala application.

On August 7, 1980, the CIC held a special meeting to consider a renewal of Zappala's application. There was a stand-

ing room only crowd of approximately 70 residents. At the meeting, Zappala repeated its April presentation. Various residents spoke either for or against the proposal. After CIC President Loman re-read the criteria of the Plan, by a seven to three vote the CIC declined Zappala's application. Various Respondents believed that nothing new was presented at the August 7 meeting.

In denying the IRB application, the CIC did not preclude K-Mart from opening in Ottawa. Rather, the CIC simply determined that the Village should not offer the inducement of preferential IRB financing to K-Mart because this did not accord with the criteria prescribed in the Plan. K-Mart and Chase could still purchase Riverview's land and proceed with the development through other financing.

Petitioners misstate the record in suggesting that Respondents voted to deny the IRB application in order to protect their own businesses. Four Respondents had no business interests whatsoever in the Village of Ottawa.[9] Two other Respondents had business interests that would either benefit or be unaffected by the K-Mart store. Respondent Richard Laudick, publisher of the *Putnam County Sentinel*, would benefit from K-Mart's entry through additional advertising revenue. Respondent Beckman's top of the line jewelry store would face no competition from K-Mart. Only Respondent Edelbrock's Sears catalog store in downtown Ottawa might have been impacted by K-Mart's entry.

The Proceedings Below

In December 1981, Riverview and Melvin Smith sued the CIC and its seven members who voted to deny Zappala's application alleging, *inter alia*, that the Respondents violated Section 1 of the Sherman Act. In May 1984, the District

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[9] These four Respondents are David Laudick, a high school mathematics teacher, Charles Bruskotter, an engineer at North American Phillips, Thomas Doepker, a territory manager selling at wholesale carpets manufactured by Cornet Industries, and Louis Macke, a retired tomato canner.

Court entered summary judgment for Respondents. The Court ruled that Riverview lacked standing to pursue its antitrust claim and that Respondents were immune from antitrust liability under the state action doctrine.

On appeal, the Sixth Circuit reversed. As to standing, the Court granted Riverview standing — based upon the allegation (yet to be proven) that Riverview planned to enter the market as a retailer to compete with other retailers in the Village.[10] *Riverview Investments, Inc.* v. *Ottawa Community Improvement Corp.* 769 F.2d 324 (6th Cir.), *as amended*, 774 F.2d 162 (6th Cir. 1985). As to state action immunity, the Sixth Circuit remanded for further proceedings in light of *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985).

On remand, following an evidentiary hearing, the District Court denied the Respondents state action immunity. Thereafter, Petitioners tried to a jury their claim that Respondents' votes to deny Zappala's application constituted a conspiracy in unreasonable restraint of trade. On February 20, 1987, the jury returned a $350,000 verdict for Petitioners. The Court trebled that amount and entered judgment for $1,050,000.

On March 2, 1987, Respondents moved for judgment notwithstanding the verdict or a new trial. Relying upon this Court's decisions in *Monsanto* and *Matsushita*, Respondents urged that Petitioners failed to present sufficient evidence to allow a jury to infer the alleged conspiracy. The motions were extensively briefed and argued following preparation of the transcript. By Memorandum and Order of April 13, 1988, the District Court ordered judgment n.o.v. for Respondents. Applying *Monsanto* and *Matsushita*, the Court determined that Petitioners failed to present evidence permitting reasonable minds to infer that Respondents had engaged in the alleged

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[10] The Sixth Circuit did not rule as to Smith's standing. The Court's opinion does not mention Smith.

conspiracy. The Court conditionally granted a new trial on the ground that the verdict was against the weight of the evidence. On March 27, 1990, the Sixth Circuit affirmed. Petitioners moved for rehearing en banc, but not one active Sixth Circuit judge supported rehearing.

REASONS FOR DENYING THE WRIT

In affirming judgment n.o.v. for Respondents, the Sixth Circuit followed this Court's teachings in *Monsanto* and *Matsushita*. *Monsanto* and *Matsushita* establish the standards for determining whether a plaintiff has presented sufficient evidence to allow a jury to infer the claimed antitrust conspiracy. The Sixth Circuit applied those standards and determined that Petitioners had presented insufficient evidence from which a jury could infer the alleged conspiracy.

This case does not warrant review by this Court. There is no unsettled question of federal law — *Monsanto* and *Matsushita* establish the applicable standards. There is no conflict between the Sixth Circuit decision and decisions of other United States Courts of Appeals — and Petitioners do not so contend. Petitioners' suggestion that the Sixth Circuit decision conflicts with *Monsanto* and *Matsushita* is meritless. Rather than disregarding those controlling precedents, the Sixth Circuit explicitly and faithfully applied those precedents.

Lacking any recognized basis for requesting a writ of certiorari, Petitioners devote their Petition to arguing that (i) both the District Court and Sixth Circuit improperly assessed Petitioners' evidence, and (ii) such evidence was sufficient to permit a jury to infer the claimed conspiracy. That Petitioners disagree with the two lower courts' assessment of the evidence is not a sufficient basis for this Court to exercise its discretionary review authority. Moreover, Petitioners' criticism of the lower courts' assessment of the evidence is insupportable. Petitioners' evidence falls woefully short of supporting an inference of the alleged conspiracy.

There are additional reasons for denying the writ. Alternative grounds (which the Sixth Circuit did not have to reach) support judgment n.o.v., reinforce the correctness of the Sixth Circuit decision, and support denying the writ. Moreover, there are no special and important reasons for this Court to review this now ancient and purely private dispute.

I. The Sixth Circuit Faithfully Applied This Court's *Monsanto* and *Matsushita* Decisions

At trial, Petitioners claimed that the CIC and seven of its board members agreed to vote to deny the IRB application and that such agreement satisfied the "contract, combination or conspiracy" element of Section 1 of the Sherman Act.

Petitioners admittedly had no direct evidence of the claimed agreement. Each Respondent denied making the claimed agreement. No witness testified to such an agreement. Instead, Petitioners asked the jury to infer the existence of the claimed agreement and conspiracy.

In *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), this Court addressed the "standard of proof" which a plaintiff must satisfy to allow a jury to infer the existence of a conspiracy to violate Section 1 of the Sherman Act. *Id.* at 755. This Court held that evidence that a manufacturer received complaints from its distributors as to the price cutting activities of another distributor was insufficient to permit a jury to infer a conspiracy to terminate the price cutting distributor. Complaints about price cutters are "natural" and " 'arise in the normal course of business.' " *Id.* at 763. To allow a jury to infer a conspiracy from such "highly ambiguous evidence" would "deter or penalize perfectly legitimate conduct." *Id.*

Rather than allowing a jury to infer a conspiracy from ambiguous evidence, this Court held that a plaintiff must present evidence that "tends to exclude the possibility" that the defendants acted independently. *Id.* at 764. "Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588.

In *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), the Supreme Court reiterated the holding of *Monsanto*. 475 U.S. at 588. The Court also examined the role of motive in inference cases. The Court deter-

mined that a lack of motive to conspire restricts the ability of a jury to infer a conspiracy.

> Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy. 475 U.S. at 596-97.

The Court carefully noted, however, that presence of motive does not "suffice to create a triable issue of conspiracy." 475 U.S. at 597 n.21. Where motive is present, the plaintiff still must satisfy the *Monsanto* standard of presenting evidence that "tends to exclude the possibility" of independent action.

Petitioners' appeal to the Sixth Circuit presented the issue of whether Petitioners had offered sufficient evidence to allow a jury to infer that the CIC and seven of its members had conspired to deny Zappala's IRB application. In resolving this issue, the Sixth Circuit applied the law as previously settled by this Court. The Sixth Circuit correctly stated that its task under *Monsanto* was to determine whether Petitioners presented evidence which "tends to exclude the possibility" of independent conduct. Pet. App. A at 16a. Reviewing Petitioners' evidence against this standard of proof, the Sixth Circuit determined that Petitioners' evidence showed conduct "as consistent with independent action as with a conspiracy" and therefore affirmed judgment n.o.v. Pet. App. A at 21a.

The Sixth Circuit also correctly stated the standard of proof of *Matsushita:*

> A fact finder may not infer a conspiracy if there is no economic motive to conspire and there is a non-conspiratorial explanation for the alleged conspiratorial conduct. Pet. App. A at 17a.

The Sixth Circuit reviewed Petitioners' evidence of motive

and concluded that such evidence was "highly ambiguous." *Id.* at 18a. In accordance with *Matsushita*, the Sixth Circuit further held that even if Petitioners had proven a motive, Petitioners still failed "to create a triable issue of conspiracy," 475 U.S. at 597 n.21, because Respondents' "conduct is just as consistent with independent action" as with conspiracy. Pet. App. A at 18a-19a.

Petitioners widely miss the mark in suggesting that the Sixth Circuit imposed "a substantial evidentiary burden on petitioners not imposed by the applicable precedents of this court" and in suggesting that the Sixth Circuit created a "new substantial evidentiary burden" out of a "mere analytical perspective." Petition at 7. To the contrary, the Sixth Circuit imposed precisely the standard of proof which the Supreme Court adopted in *Monsanto* and *Matsushita*. The Sixth Circuit in no sense created a new evidentiary burden. Petitioners cite no language from the Sixth Circuit opinion which is inconsistent with *Monsanto* and *Matsushita*. Petitioners cite no language setting forth the supposed new evidentiary burden and do not contrast that burden with the burden set forth in *Monsanto* and *Matsushita*.

Indeed, it is Petitioners who misconstrue *Monsanto* and *Matsushita*. Petitioners downplay these important Supreme Court decisions, suggesting that they create "a mere analytical perspective" — rather than a standard of proof. Petitioners should reread the first paragraph of both *Monsanto* and *Matsushita*. Those paragraphs make clear that this Court was announcing the standard of proof which a plaintiff must satisfy to ask a jury to infer an alleged antitrust conspiracy.

II. Petitioners' Contention That The Sixth Circuit and District Court Improperly Assessed Petitioners' Evidence Does Not Merit Review.

The thrust of the Petition is not that the law is unsettled as to the standard of proof for inferring a conspiracy — or that the Sixth Circuit decision conflicts with decisions of other circuit courts — or even that the Sixth Circuit decision conflicts with prior decisions of this Court.

Rather, the thrust of the Petition is that the Sixth Circuit and District Court improperly assessed Petitioners' evidence and this Court should re-examine the facts. The Petition repeatedly demonstrates this point. Petitioners repeatedly criticize the Sixth Circuit and District Court for "failing to . . . accept the sufficiency of Petitioners' evidence," for ignoring "the focus of Petitioners' evidence," for "rejecting the sufficiency of this evidence," and for "holding that all this evidence was inadequate to support a finding of conspiracy." Petition at 15, 10, 13, 12.

Petitioners' desire for a further review of the sufficiency of their evidence does not merit this Court's exercising its discretionary review authority. The District Court and the Sixth Circuit carefully reviewed the evidence and determined that Petitioners had not created a jury issue as to the alleged conspiracy. In such circumstances, further review is inappropriate:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.[11]

Denial of the writ is proper where Petitioners seek the writ merely for a further review of the sufficiency of their evidence.

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[11] *Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949), and cases cited; *NCAA* v. *Board of Regents*, 468 U.S. 85, 98 n.15 (1984).

Moreover, the Sixth Circuit and District Court correctly determined that Petitioners' evidence was insufficient to permit a jury to infer the alleged conspiracy.

Petitioners cite three categories of evidence to support inferring a conspiracy: (i) alleged motive, (ii) communications outside the CIC meetings, and (iii) parallel (and allegedly improper) reasons for denying the IRB application.

As to motive, the Sixth Circuit determined that Petitioners' evidence was "highly ambiguous." Pet. App. A at 18a. The Sixth Circuit found that four Respondents had no "personal business interests" at stake, and that there was no evidence that the K-Mart store would injure the business interests of Respondents Beckman and Richard Laudick. Only Respondent Edelbrock "owned a store that would compete directly" with the K-Mart development. *Id.* In accord with *Matsushita*, the absence of motive and the plausible nonconspiratorial explanation for Respondents' votes — that Respondents in the good faith performance of their civic duty determined that Zappala's application did not satisfy the criteria of the Plan — precludes inferring the alleged conspiracy.[12]

Tellingly, the Sixth Circuit correctly held that even if Petitioners had presented evidence of motive, such evidence does not relieve Petitioners of their obligation to present evidence that tends to exclude the possibility that Respondents acted independently. Pet. App. A at 18a. *Matsushita* directly supports this holding. 475 U.S. at 597 n.21. Petitioners misread the law in asserting that "a motive to conspire . . . tends to exclude the possibility of independent action." Petition at 10.

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[12] Petitioners misstate the Sixth Circuit's discussion with respect to motive. The Sixth Circuit did not "recognize" that at least three CIC members had personal economic motives to deny the IRB application and that other CIC members had "committed themselves to protecting existing businesses from competition." Instead, the Sixth Circuit was describing Petitioners' argument in this discussion — not accepting that argument. Rather than finding a motive to conspire, as noted, the Sixth Circuit found Petitioners' motive evidence to be "highly ambiguous."

The Sixth Circuit was also correct in determining that Petitioners' second category of evidence — discussions outside of CIC meetings — did not tend to exclude the possibility of independent conduct. The Sixth Circuit found "nothing unusual about informal contacts between CIC members and local businessmen." Pet. App. A at 20a. As noted, Petitioner Smith himself engaged in an extensive lobbying campaign in support of the IRB application. CIC members had a duty to listen to both sides of this public discussion. Such discussions do not "tend to exclude the possibility" of independent conduct. As stated in *Monsanto*, allowing an inference of conspiracy from such discussions would "deter or penalize perfectly legitimate conduct." 465 U.S. at 763.

Petitioners' third category of evidence — that Respondents in parallel misinterpreted the Plan by focusing on the net impact on jobs in the Village and on the impact on the downtown section — also does not support inferring a conspiracy. (i) Petitioners overstate the similarity of Respondents' reasoning. There were variances in Respondents' reasons for voting against the IRB application. (ii) In this context, parallel reasoning is fully consistent with independent conduct. The Plan prescribed specific criteria and obviously Respondents would focus on these criteria. (iii) As both the District Court and Sixth Circuit determined, Respondents did not misinterpret the Plan. Considering the net job impact and the downtown section (which contained most of the retail establishments in the Village) was appropriate under the Plan. (iv) Moreover, Petitioners' assertion of misinterpretation, if true, proves only improper administration of the Plan. It does not prove a conspiracy. *Huron Valley Hospital, Inc.* v. *City of Pontiac*, 650 F. Supp. 1325, 1338 (E.D. Mich. 1986), *aff'd* 849 F.2d 262 (6th Cir.) *cert. denied* 109 S. Ct. 367 (1988).

III. Additional Grounds Support Denying the Writ.

Additional grounds supporting judgment n.o.v. which the Sixth Circuit did not reach include the following.[13]

Respondents Were Incapable of Conspiring

Petitioners' claim — that the CIC and seven of its board members conspired together to restrain trade — is insufficient as a matter of law

A corporation cannot conspire with its directors, officers, and employees.[14] "If this were not the rule, every decision of a corporation . . . would be the result of a conspiracy actionable under the Act.[15] The rule applies to all corporations, including governmental and nonprofit corporations. *Fisher* v. *City of Berkeley*, 475 U.S. 260 (1986); *Hatley* v. *American Quarter Horse Ass'n*, 552 F.2d 646, 654 n.7 (5th Cir. 1977). The cited rule directly supports the judgment below.

Riverview Lacked Standing to Sue

Riverview's role in the proposed development was as a seller of land. Chase, not Riverview, would own the land, construct the building, and lease it to K-Mart. K-Mart, not Riverview, would enter the market as a new retail competitor.

Riverview lacked standing to sue. In *Southaven Land Co.*

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[13] A respondent may "urge any grounds which would lend support to the judgment below." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977).

[14] *E.g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 (1984); *Potters Medical Center* v. *City Hospital Ass'n*, 800 F.2d 568 (6th Cir. 1986); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (characterizing the conspiracy claim as "absurd").

[15] *Nurse Midwifery Associates* v. *Hibbett*, 689 F. Supp. 799, 803 (M.D. Tenn. 1988).

v. *Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983), the Sixth Circuit held that the lessor of retail stores lacked standing to sue for anticompetitive conduct which injured its lessees and thereby diminished the lessor's rental income. In *Wellwoods Development Co.* v. *City of Aurora*, 631 F. Supp. 221 (N.D. Ill. 1986), *aff'd without opinion*, 822 F.2d 1091 (7th Cir. 1987), the Seventh Circuit held that an owner of land adjacent to a city airport who had an agreement to sell the land for an airport-related development lacked standing to sue as to an alleged conspiracy to deny its purchaser the permits needed to proceed with the development. *Southhaven* and *Wellwoods* directly support judgment n.o.v.[16]

Smith Had No Standing To Sue

At trial, Smith claimed damages because loss of the sale to Chase caused him to devote additional time to Riverview's affairs at the expense of his entirely separate real estate brokerage proprietorship, Buckeye American Realty.[17] Smith had no standing to assert this claim.

Overwhelming case authority establishes that Smith had no standing to sue in his capacity as an officer and shareholder of Riverview.[18] Any cause of action belongs to the corporation, not to its officers, directors, or shareholders. The cases also establish that Smith cannot sue in the even more remote capacity as proprietor of Buckeye American Realty — and cannot claim damages because his attention allegedly was diverted from that business to Riverview's affairs. *Midwestern Waffles, Inc.* v. *Waffle House, Inc.*, 734 F.2d

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[16] The Sixth Circuit granted Riverview standing at the pleading stage based upon the allegation which was not proven at trial that Riverview would enter the market as a retailer. 769 F.2d at 328-29.

[17] A substantial but undetermined portion of the jury award was in response to this claim.

[18] *E.g. Martens* v. *Barrett*, 245 F.2d 844, 846 (5th Cir. 1957). ([I]t is universal that . . . it is that corporation alone, and not its stockholders (few or many), officers, directors, creditors or licensors, who has a right of recovery . . . .).

705, 710-11 (11th Cir. 1984); *Palazzo* v. *Gulf Oil Corp.*, 764 F.2d 1381, 1387-88 and n.7 (11th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

Other Reasons for Denying the Writ

In addition to the foregoing, Respondents presented other grounds supporting their motion for judgment n.o.v. or a new trial.[19] These grounds, which the Sixth Circuit did not reach, further reinforce the correctness of the judgment below and support denying the writ.

This private and ancient dispute does not warrant further review. Riverview's land was developed years ago and this dispute has ceased to have significance to the Village or its residents. Likewise, the unique facts of the case present no issue of general effect and application.

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[19] These grounds include that Petitioners failed to prove an unreasonable restraint of trade, errors in the jury instructions and in the admission of evidence, and that the damage award was excessive.

CONCLUSION

Respondents respectfully submit that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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APPENDIX A

Nos. 88-3381-3399

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RIVERVIEW INVESTMENTS, INC. and
MELVIN F. SMITH,
Plaintiffs-Appellants
and Cross-Appellees,

v.

OTTAWA COMMUNITY IMPROVEMENT CORP.,
VILLAGE OF OTTAWA, CHARLES BRUSKOTTER,
JAMES BECKMAN, RICHARD EDELBROCK,
RICHARD LAUDICK, LOUIS MACKE,
Defendants-Appellees
and Cross-Appellants.

BEFORE: MERRITT, Chief Judge; KENNEDY, Circuit Judge; and McRAE, Senior District Judge.*

It appearing to the Court that the final sentence of the opinion did not include all of the appellees,

It is Ordered that the final sentence be modified to read "For the foregoing reasons, we AFFIRM the District Court's grant of judgment n.o.v. for appellees."

ENTERED BY ORDER OF THE COURT

/s/ LAWRENCE GREEN
Clerk

* The Honorable Robert M. McRae, Jr., United States District Court for the Western District of Tennessee, sitting by desgination.